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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-88

THE PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

vs.

JOHN MICHAEL WHYTE
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, First Appellate District, State of California

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PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, First Appellate District, State of California

The People of the State of California, respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal affirming the trial court's suppression of forty-three pounds of hashish imported from India and thereby precluding respondent's prosecution.

OPINION BELOW

The opinion of Division Two, First Appellate District, California Court of Appeal, is set forth as Appendix A to this petition. It is also reported as *People v. Whyte,* 90 Cal.3d 235, 152 Cal.Rptr. 280 (1979). A copy of that court's order denying our petition for rehearing is set

forth as Appendix B. A copy of the California Supreme Court's order denying our petition for hearing is set forth as Appendix C.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257(3) since a right is claimed under the Fourth Amendment to the Constitution of the United States.

The Supreme Court of California denied hearing in this case on April 19, 1979. The instant Petition for a Writ of Certiorari is filed within ninety days of that order.

QUESTIONS PRESENTED

Whether federal agents could properly conduct a warrantless search and seizure of goods imported from abroad?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

STATUTES INVOLVED

19 United States Code section 482:

> "Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they

> shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial."

STATEMENT UNDER RULE 33(2)(b)

> "Since the proceeding draws into question the constitutionality of 19 U.S.C. § 482, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable."

STATEMENT OF THE CASE

A. History of the Case

In an information filed in the California Superior Court for the County of Marin, respondent was charged with the unlawful transportation and importation of hashish in violation of section 11360(a) of the California Health and Safety Code (Cl.Tr. 1-2).[1] Respondent thereafter entered a plea of not guilty. Respondent's motion to set aside the

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[1]Reference is to the clerk's transcript of the trial court proceedings. Section 11360(a) is set forth in Appendix D.

information pursuant to California Penal Code section 995,[2] and his motion pursuant to California Penal Code section 1538.5[3] were heard on October 13, 1977 and the matter was submitted on the basis of the preliminary examination transcript and points and authorities filed by counsel (Cl.Tr. 33). On October 14, 1977, the court granted respondent's motion and dismissed the case (Cl.Tr. 33-34).

Petitioner appealed to the California Court of Appeal, First Appellate District, from the judgment of dismissal and the order suppressing the evidence. Such appeal was properly brought under California Penal Code section 1538.5(n)(v) and under the authority of *People v. Minervini* (1971) 20 Cal.App.3d 832, 836, 98 Cal.Rptr. 107. On January 31, 1979, Division Two of that court affirmed the judgment and order of the superior court in an opinion

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[2]California Penal Code section 995 states in pertinent part that an information must be set aside if "the defendant had been committed without reasonable and probable cause."

[3]California Penal Code section 1538.5 states in applicable part that:

> "(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:
>
> (1) The search or seizure without a warrant was unreasonable.
>
> (2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.
>
> • • •
>
> "(n) . . . Nothing in this section shall be construed as altering . . . (v) the procedure or law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion."

set forth in Appendix A. The court's opinion is based solely on Federal Constitutional law. A petition for rehearing was denied on March 2, 1979.

The California Supreme Court denied a petition for hearing on April 19, 1979.

B. Statement of the Facts

Douglas Ross, a United States Customs agent, was working with a specially trained dog at the foreign import section at the San Francisco Airport cargo shed on April 9, 1977 (RT 8-11).[4] The dog, "Boy,"[5] began scratching at six large bales of burlap. Ross notified Customs Inspector Kaufman and they opened one bale and found approximately thirty ounces of hashish concealed in a laminated board in the center of the bale (RT 12-13, 23). All bales were taken to the Customs Office for security at about 12:30 p.m. (RT 22).

The shipping documents attached to the burlap showed that the shipper was "John Michael Whyte, c/o the Taj Mahal Hotel, Bombay, India" and that the recipient was "John Michael Whyte, c/o the Asiatic Galleries, 335 San Anselmo Avenue, San Anselmo, California." (RT 25).

On April 12, 1977, respondent John Michael Whyte requested the Frank Dow Brokerage Company to deliver the shipment by the Boland Trucking Company on the following day, April 13, 1977 (RT 25-26).

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[4]"RT" designates the reporter's transcript of the preliminary examination held on June 24 and July 15, 1977.

[5]"Boy" was fully qualified as an expert in the detection of marijuana and hashish by virtue of his training (400 hours at the Narcotics Detector Dog Training Center) and his experience (70-90 finds of marijuana and 50 finds of hashish) (RT 8-10).

Agent Clinton Cook of the Drug Enforcement Administration of the United States Department of Justice was contacted by Customs and assigned to accompany the truck and help deliver the bales (RT 26). He arrived at the Abraxas Book Store at 335 San Anselmo Avenue on April 13 at 11:30 a.m. and contacted the clerk, Carla Cunningham, regarding the bales (RT 27).

Ms. Cunningham had been telephoned by respondent approximately a week previously. He told her some "art goods" would be arriving and that she should accept them when they came (RT 48). On April 13, 1977, about 10:45 a.m., respondent came into the store and told Ms. Cunningham that the "art goods" would arrive that day. She was instructed to give the delivery persons a check which he left. He then said to have the bales, which would be big, placed in front of the store as he would pick them up later (RT 50-51).

When Agent Cook notified Ms. Cunningham that the goods had arrived, she gave him a certified check for $268.38. Ms. Cunningham told Cook that respondent had given her the check for payment of the goods and, pursuant to respondent's specific instructions, told Cook to put the six bales on the sidewalk outside the store (RT 28). The bales were heavy and it took two men to place them in front of the store (RT 36). About an hour after Cook and the other deliverymen left, respondent came into the store and told Ms. Cunningham that he needed to get a truck to pick up the bales (RT 51). About 4:30 p.m., respondent called Ms. Cunningham and said he didn't have the truck yet, that she should go ahead and close the store and he would pick up

the bales later (RT 52). He again told her to leave and that he would pick up the bales from the sidewalk (RT 52).

At about 5:45 p.m. another clerk in the store said that the bales shouldn't be left outside as they were "expensive." He proceeded to drag the bales into the store (RT 52). Federal agents, assisted by San Anselmo Police, came in and arrested Ms. Cunningham (RT 53). The bales were put back outside in front of the store (RT 61).

Throughout the day, Federal agents had kept the store under surveillance (RT 32-36, 43, 57). At about 1:20 p.m., respondent was observed entering the store and then leaving after a few minutes (RT 58). Shortly thereafter, he was seen walking out of an alleyway across the street. He came out, looked around and then went back down the alley. Later, he was observed sitting in a vehicle near the Post Office about 200 yards from and facing the book store (RT 58). Respondent was later seen driving past the bookstore (RT 59).

Agents continued the surveillance until 11:15 p.m.; they then took the bales into custody at the San Anselmo Police Station (RT 61). There was over forty-three pounds of hashish inside the bales of cloth (RT 63).

REASONS FOR GRANTING THE WRIT

The decision of the California Court of Appeal is in direct conflict with the grant of authority set out in Title 19, section 482, of the United States Code which empowers federal customs agents to conduct warrantless searches and seizures of goods imported from abroad. The court's opinion represents a misunderstanding of Fourth Amend-

ment warrant requirements and of the federal law governing border searches. As California has one of the most extensive borders and import operations in the United States, the decision has a far-reaching impact on the conduct and authority of federal customs agents acting under Title 19 U.S.C. section 482.

ARGUMENT

FEDERAL AGENTS COULD PROPERLY CONDUCT A WARRANTLESS SEARCH AND SEIZURE OF GOODS IMPORTED FROM ABROAD

It is well established that searches made at the border are reasonable. Such searches are made pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country. *United States v. Ramsey,* 431 U.S. 606 (1977). This right was recognized even prior to the proposal of the Fourth Amendment. As explained in *Boyd v. United States,* 116 U.S. 616, 623 (1886):

> "The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. at L. 43, contains the same provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment."

The reasonableness of warrantless border searches has been upheld consistently by this Court. *Carroll v. United States,* 267 U.S. 132, 153-154 (1925); *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 376 (1971); *United States v. 12 200-Ft. Reels of Film,* 413 U.S. 123, 125 (1973); *Almeida-Sanchez v. United States,* 413 U.S. 266, 272 (1973).

Here the record shows that the search of the imported articles was commenced by customs agents (RT 8-11, 22, 26). The delivery and ultimate reseizure of the goods involved the cooperation of Drug Enforcement Administration Agents (hereinafter DEA) and local authorities. DEA agents are specifically empowered under 5 USC, Appendix II, section 1, to search for and seize imported contraband.[6]

Though this Court has not yet decided the question of whether there are geographical limits to border searches for items entering the country,[7] various federal circuits have found that it is permissible for federal agents to arrange for controlled deliveries of contraband articles imported from abroad, *United States v. Davis* (7th Cir. 1959) 272 F.2d 149, 153.

> ". . . To require immediate seizure of the contraband upon discovery would deprive federal officers of a most

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[6]See Appendix E for the text of 5 USC, Appendix II which grants the Department of Justice, through DEA, the authorization to conduct customs searches and seizures for imported illicit narcotics, dangerous drugs and marihuana. See also 19 Code of Federal Regulations 162.

[7]In *United States v. Ramsey,* 431 U.S. 606, *supra,* n.11 at 615, this Court specially reserved this question.

effective method of obtaining evidence against ultimate consignees, clearly a result contrary to Congressional intent." *Id.*, 153. See also, *United States v. One 1974 Jeep* (9th Cir. 1976) 536 F.2d 1285, 1286-1287; *United States v. King* (5th Cir. 1975) 517 F.2d 350, 354.

Even though the delivery of the imported articles may take place some distance from the border, it is permissible for federal agents to follow the suspected contraband to its ultimate destination and then to seize it. *United States v. Fogelman* (5th Cir. 1978) 586 F.2d 337, 334; *Alexander v. United States* (9th Cir. 1966) 362 F.2d 379, 382, cert. denied 385 U.S. 977.

The rationale for these extended border searches in controlled delivery cases was articulated in *United States v. Martinez* (5th Cir. 1973) 481 F.2d 214, cert. denied 415 U.S. 931:

> "In order to enforce the customs laws, particularly those dealing with the illegal importation of drugs, law enforcement officials must do more than arrest the street level operative; they must, if all possible, apprehend the ringleaders as well. This objective would not be easily attainable of the authority of customs agents to search was strictly limited to the physical border. By following the truck inland, the customs agents obviously hoped to apprehend others involved in the smuggling of a large quantity of marijuana. In view of their purpose we think they used a legitimate law enforcement technique which did not undermine their authority." *Id.* at 218.

Here, agents had probable cause to believe that the imported articles contained contraband. The bales were searched and, in fact, seized at the airport (RT 12-13, 23).

They allowed the articles to be delivered pursuant to respondent's specific instructions (RT 25-26, 28). Meanwhile, the articles were under their constant surveillance (RT 32-36, 43, 57).[8]

The California Court of Appeal found, however, that when a third party dragged the articles from the sidewalk into a bookstore the respondent was "entitled to protection from unreasonable government intrusion" because "home and offices fall within this category of maximum protection" (90 Cal.App.3d 235, 244, 152 Cal.Rptr. 280, 285).

First the record shows that: (1) the bookstore was a business establishment open to the public (RT 27); (2) that the bales were dragged into this store (RT 52);[9] (3) that respondent had left specific instructions that the articles be left outside on the sidewalk (RT 50-51, 52) and (4) that a third party intermeddler disregarded this instruction by moving the articles (RT 52). It was at this moment that the agents retrieved the articles to prevent interference with the controlled delivery (RT 53, 61). This, we submit, was a constitutionally permissible action. The bales, which had already been searched and seized, could properly be taken without a warrant at any point while in transit to the consignee. *United States v. Davis, supra,* 272 F.2d 149, 153. Even if it be assumed that the third party, with knowledge of the contents of the bales, deliberately attempted to move

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[8]Under *Alexander v. United States, supra,* 362 F.2d at 382, it appears to be a federal requirement that the prosecution show that the contraband searched or seized is the same as that observed at the time of entry into the country.

[9]Though respondent rented space from this business establishment, there is no evidence that the office or space he rented was the area where the articles were placed.

the contraband in order to conceal it, the same rule would be true. When they have witnessed the offenses, officers may properly seize the evidence and arrest the person for concealing or destroying evidence. California Penal Code section 135; see *People v. Edgar* 60 Cal.2d 171, 175-176, 32 Cal.Rptr. 41, 383 P.2d 449 (1963).

Though offices as well as homes are entitled to maximum constitutional protection, there was no "office" possessed by respondent which was subject to governmental intrusion. In each of the cases relied upon by the Court of Appeal, (90 Cal.App.3d 235, 244, 152 Cal.Rptr. 280, 285), the room, home or office belonged to the defendant. In *Silverman v. United States,* 365 U.S. 505 (1961) the protected premise was a house used by defendants as a gambling headquarters. *Id.* at 512. In *Stoner v. California,* 376 U.S. 483 (1964) the protected area was a hotel room rented by the defendant. *Id.* at 489. In *United States v. Nelson* (6th Cir. 1972) 459 F.2d 884, the area at issue was a motel room rented by the defendant. Here, the area did not belong to respondent and was not a private office.

In any event, this Court had repeatedly held ". . . the Fourth Amendment protects people—and not simply 'areas' —against unreasonable searches and seizures." *Katz v. United States,* 389 U.S. 347, 353 (1967). It cannot be said here that respondent entertained any expectation of privacy in bales imported from abroad and subject to Customs inspection which he ordered to be left on a public sidewalk. Neither the third party intermeddler nor any other person had any Fourth Amendment rights in the bales. The Court has stated that Fourth Amendment rights, unlike some other constitution rights, are personal and

may not be vicariously asserted. *Brown v. United States* 411 U.S. 223 (1973). In *Brown,* the court found that the defendant had no standing to assert a Fourth Amendment violation because he had no proprietary or possessory interest in a retail store or goods therein which had been subject to search under a defective warrant when he was not on the premises. *Id.* at 230. *Accord, Simmons v. United States* 390 U.S. 377, 390-391 (1968); *Jones v. United States* 362 U.S. 257, 265-267 (1960); *Combs v. United States* 408 U.S. 224, 227 (1972).[10] The bales were not addressed to them or to the bookstore,[11] but to respondent who specifically directed they be left outside. The place where the bales were moved was not respondent's office but another person's business establishment in which respondent could not and did not have any expectation of privacy. Here, the agents acted promptly to prevent disruption of the controlled delivery. Their conduct did not, in fact, constitute a search and seizure, but was a recapture of the goods properly under their dominion and control. There was, in short, nothing constitutionally impermissible in attempting to prevent a clerk from inadvertently or purposefully interfering with the controlled delivery of the imported contraband. The Court of Appeal has mistakenly restricted the

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[10]Moreover, even in California, which does have a vicarious exclusionary rule (*People v. Martin,* 45 Cal.2d 755, 759-761, 290 P.2d 855, [1955]), respondent would not have any Fourth Amendment rights in either the store or the goods by virtue of the clerk's action. Under California law, intermeddlers, uninvited guests, burglars or trespassers have no standing to object. See, *People v. Solario* 19 Cal.3d 760, 764, 139 Cal.Rptr. 725, 566 P.2d 627 (1977); *People v. Superior Court (Cleaver)* (1979) 24 Cal.3d 297, 306, 155 Cal.Rptr. 559, 594 P.2d 984.

[11]The bales were not addressed to the Abraxas bookstore but to "John Michael Whyte, c/o the Asiatic Galleries, 335 San Anselmo Avenue, San Anselmo, California" (RT 25).

authority of federal agents to enforce the United States customs laws in the several states.

Moreover, the California Court of Appeal mistakenly applied the exclusionary rule to a perfectly proper search. The purpose of the rule excluding evidence is to deter illegal police conduct. *Mapp v. Ohio,* 367 U.S. 643, 656 (1961).

> ". . . to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States,* 364 U.S. 206, 217 (1960).

Under Federal law, which governs this case, the search, seizure and recovery of the hashish was proper as a customs search accomplished by authorized Customs and DEA agents. There was no "unreasonable government intrusion" and no violation of anyone's Fourth Amendment rights by the Agent's seizure of the contraband which had been moved by an intermeddler. There was, in short, no illegal police conduct and thus there is no basis for applying the exclusionary rule.

Because of the vast border and of the extensive import operations in California, the Court of Appeal decision will have a considerable impact on the authority of federal officers in California to carry out their proper duties for searches and seizures of imported articles. There is yet another important consideration at stake. The decision creates a direct conflict with the federal law which has no warrant requirement for customs searches. Cases hitherto sent to the state courts for prosecution to relieve an already

overburdened federal court system will now have to be charged and tried in the federal district courts. Moreover, the California appellate decision clearly portends what other states might well feel free to do. That is to impose restrictions on the authority of federal agents to conduct warrantless searches and seizures and thus to curtail their power to inspect imported articles. The effect of such action by state courts would be the imposition of restrictions on Customs searches by fifty different jurisdictions. This would not only create a bewildering array of different interpretations as to the proper scope of Customs actions, but would undermine the very authority and power of Customs. This Court should act in this case to prevent such a result.

CONCLUSION

The search and seizure of the imported bales was a proper search by Customs agents. The subsequent controlled delivery was a proper and accepted practice by authorized Customs and DEA agents. Recovery was proper, without a warrant, at any time while the contraband was in transit to the ultimate consignee. The movement of the contraband by a third party intermeddler from a sidewalk into a business open to the public did not give any individual a Fourth Amendment expectation of privacy in the contraband. There is no deterrent value in exclusion of the evidence as there was no illegal police conduct.

Because of the far reaching impact the erroneous Court of Appeal decision has on the authority and conduct of

federal agents in their duties to search and seize imported articles, appellant respectfully submits that the petition for writ of certiorari should be granted.

Dated: July 17, 1979

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(Appendices Follow)

Appendices

APPENDIX A

Certified for Publication

In the Court of Appeal

of the

State of California

First Appellate District

Division Two

1 Crim. 17661

(Sup. Ct. No. 6460)

People of the State of California,

Plaintiff and Appellant,

v.

John Michael Whyte,

Defendant and Respondent.

[Filed Jan. 31, 1979]

OPINION

The People appeal from an order of Marin County Superior Court granting a motion to suppress and dismissing an information for the import and transport of hashish in the State of California in violation of section 11360(a) of the Health and Safety Code.

Uncontroverted evidence produced at a preliminary examination and made part of the record at the hearing

de novo revealed that on April 9, 1977, Douglas Ross, a United States Customs agent, was working with a specially trained dog at the foreign import section of the San Francisco Airport cargo shed when the dog began scratching at six large bales of burlap. Ross notified Inspector Kaufman and they opened one bale. They found approximately 30 ounces of hashish in a laminated board in the center of the bale. All bales were taken to the Customs Office for security.

The shipping document for the burlap indicated that the shipper was "John Michael Whyte, c/o the Taj Mahal Hotel, Bombay, India," and the recipient was "John Michael Whyte, c/o the Asiatic Galleries, 335 San Anselmo Avenue, San Anselmo, California." Respondent rented space at the San Anselmo address.

On April 12, 1977, respondent contacted the Frank Dow Brokerage Company and requested that the shipment be delivered by Bolan Trucking Company on the following day, April 13, 1977.

Agent Clinton Cook of the Drug Enforcement Administration (hereinafter DEA) of the United States Department of Justice was contacted by Customs and assigned to accompany the truck and help deliver the bales. No search warrant was issued or applied for. Cook believed no warrant was necessary, since the bales were being delivered to a book store, and not a residence. He arrived at the Abraxas Book Store, 335 San Anselmo Avenue, in San Anselmo, at 11:30 a.m., and contacted the clerk, Carla Cunningham, regarding the bales.

Ms. Cunningham had been telephoned by respondent approximately a week previously. He told her some "art goods" would be delivered and that she should accept them when they came. On April 13, 1977, respondent came into the store and told Ms. Cunningham that the "art goods" would arrive that day. She was instructed to give the delivery persons a check which he left. He then said to put the bales, which would be big, in front of the store, and that he would pick them up later.

When agent Cook notified Ms. Cunningham that the goods had arrived, she gave him a certified check for $268.38. Ms. Cunningham told Cook that respondent had given her the check for payment of the goods and instructed Cook to put the six bales on the sidewalk outside the store, which he did. About an hour after Cook and the other deliverymen left, respondent came into the store and told Ms. Cunningham that he needed to get a truck to pick up the bales. About 4:30 p.m., respondent called Ms. Cunningham and said he did not yet have the truck, that she should close the store and he would pick up the bales later.

At about 5:45 p.m., another clerk in the store said that the bales shouldn't be left outside as they were "expensive." He proceeded to drag the bales into the store. Federal agents, assisted by San Anselmo police, came in and arrested Ms. Cunningham. The bales were put back outside in front of the store.

Throughout the day, federal agents and local police had kept the store under surveillance. At about 1:20 p.m., respondent was observed entering the store and then leaving after a few minutes. Later, he was observed sitting

in a vehicle near the post office about 200 yards from and facing the book store. Respondent was later seen driving past the book store.

Agents continued the surveillance until 11:15 p.m., at which time they took the bales into custody at the San Anselmo Police Station. There were 43 pounds, 10 ounces of hashish inside the bales of cloth.

Pursuant to section 1538.5 of the Penal Code, defense counsel moved to suppress the evidence on the grounds that the warrantless seizure of the bales inside respondent's office was unlawful. Counsel also moved to set aside the information under section 995 of the Penal Code based on the grounds that (1) the offense was not committed in the County of Marin and (2) the state importation statute was perempted by federal importation statutes. Relying on *United States v. Chadwick* (1977) 433 U.S. 1, the trial court granted both motions.

The People contend that the evidence was properly searched and seized and the court erred in suppressing evidence on the basis of *Chadwick.*

Before proceeding to the merits of the People's argument, we must first consider respondent's contention that the search warrant issue is not properly before this court. The People appeal from the granting of the motion to set aside the information pursuant to section 995 of the Penal Code. However, the issues raised by appellant concern the validity of the warrantless search which was the basis for granting the motion to suppress pursuant to section 1538.5 of the Penal Code. Respondent contends that the trial

court dismissed the information under section 995 of the Penal Code, which was supported by separate and independent grounds. We disagree.

The sole grounds stated by the trial court for granting both the 995 and 1538.5 motions was "the compulsion of *United States v. Chadwick.*" While respondent's 995 motion may have been based on jurisdiction and/or peremption arguments, it is evident that the court set aside the information on a different theory; namely, that the evidence supporting the information was obtained illegally.

When the only substantial evidence supporting the commitment has been obtained in violation of the Fourth Amendment, a defendant is held to answer without reasonable or probable cause within the meaning of section 995 of the Penal Code. (*People v. Scoma* (1969) 71 Cal. 2d 332, 335.)

Respondent cites *People v. Minervini* (1971) 20 Cal. App. 3d 832, 836 for the proposition that if the trial court undertakes to dismiss an information contemporaneously with the granting of a motion to suppress, such action should be taken under Penal Code section 1358, rather than section 995, to permit an orderly review on appeal. (See Pen. Code, § 1238(a)(7).)

However, "Section 1538.5 of the Penal Code, which deals in general with motions to suppress as evidence properly obtained in violation of the Fourth Amendment, provides in subdivision (n) that ' "Nothing in this section shall be construed as altering . . . (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granted or

denial of such a motion."' It therefore appears that Section 995 remains a proper remedy when the evidence alleged to have been obtained through illegal means is the only substantial evidence supporting the commitment." (*People v. Scoma, supra,* at p. 335, fn. 2.)

In *Minervini,* as in the instant action, respondents moved to suppress evidence and to set aside the information pursuant to sections 1538.5 and 995 of the Penal Code. After discussing the consternation that results from the making of simultaneous, undifferentiated orders suppressing evidence and setting aside an information, the court concluded that where the defendants have successfully contended that the evidence should be suppressed because of its incompetency under the Fourth Amendment and also have successfully argued that the evidence before the judge was inadequate, the appropriate procedure is to entertain an appeal from the order setting aside the information and treat the dismissal as having stemmed from the suppression order. (*People v. Minervini, supra,* at p. 836.)

Therefore, it is our conclusion that an order to set aside an information pursuant to section 995 of the Penal Code may be based on a determination that evidence to support the information was illegally searched and seized. (Cf. *People v. Superior Court (Kusano)* (1969) 276 Cal. App. 2d 581, 586, fn. 4.) Accordingly, the grounds for granting the motion to suppress are reviewable on appeal from the granting of the Section 995 motion.

Respondent next contends that since prior to this appeal appellant never put forth the theory that the instant search

was a Customs search, the issue is not properly before this court. This contention must also be rejected.

At the preliminary examination, the prosecution principally contended that a warrant was not needed because it was a business and not a residence. In its response to respondent's motion to suppress, the prosecution argued that the search was incident to the arrest of Ms. Cunningham. However, at the time of the preliminary examination, the prosecutor, during his final argument, asked the court to take into consideration the agent's area involving Customs. He argued that Customs agents need not show probable cause before searching evidence coming through international trade and that the Customs agent is in constructive possession of the evidence up until the time of delivery. While it is preferable for the prosecution to set forth its justification for a warrantless search and/or seizure in its response to the defendant's motion to suppress evidence, the People's theory or justification can be determined from the evidence and argument offered. (*People v. Manning* (1973) 33 Cal. App. 3d 586, 601.) Since, in the present case, the preliminary examination transcript was made part of respondent's motion to suppress, appellant is not precluded from raising this issue on appeal.

Appellant's single contention on appeal is that the subject warrantless search and seizure of the evidence in San Anselmo was proper, since the search was undertaken by United States Customs Officials acting under the aegis of

19 U.S.C. 482.[1] The People argue that no warrant is necessary in cases where customs officials search pursuant to their powers under this and related sections.[2]

The People cite *United States v. King* (5th Cir. 1975) 517 F.2d 350 for the proposition that items still in transit properly can be searched and seized by Customs officials, and *Chapman v. United States* (10th Cir. 1971) 443 F.2d 917 and *United States v. Davis* (7th Cir. 1959) 272 F.2d 149 for the proposition that it is proper for Customs agents to arrange for a "controlled delivery" where there is contraband discovered in imported articles. Consequently, they conclude that it was proper for Customs to contact the DEA to arrange for an agent to deliver the shipment and subsequently seize and search the bales of burlap. We cannot agree.

It is unreasonable to characterize this search and seizure as a Customs search when the bales had been searched by

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[1]19 USC 482 states:

"Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial."

[2]19 USC 1499 also authorizes examination of imported merchandise.

Customs four days earlier at San Francisco International Airport and the seizure was carried out by DEA and police agents at a bookstore after the goods were in the possession of federal agents for the entire four-day period prior to the "controlled delivery."

We find few "controlled delivery" cases where a court characterized the search as a Customs search. In every California case, a judicially-authorized warrant was obtained because the agents realized they were not carrying out a Customs search. (See *People v. Duncan* (1974) 40 Cal.App.3d 940; *People v. Shapiro* (1974) 37 Cal.App.3d 1038; *People v. Kosoff* (1973) 34 Cal.App.3d 920; *People v. Sloss* (1973) 34 Cal.App.3d 74; *Weber v. Superior Court* (1973) 30 Cal.App.3d 810; *People v. Superior Court* (*Marcil*) (1972) 27 Cal.App.3d 404; *Alvides v. Superior Court* (1970) 172 Cal.App.3d 575). Similarly, in *Chapman,* a search warrant was issued after Customs searched the contraband.

Reliance on the authority of the Customs service is particularly misplaced in the case at bench. Appellent asserts that the bales of burlap were still in transit to the ultimate consignee, the respondent. On the contrary, we find that the bales were deliver to respondent's place of business. While they were out on the sidewalk, under surveillance of federal agents, it conceivably could be argued that they remained in transit and under the control of the Customs Service. However, once the bales were placed inside of the Abraxas Book Store where respondent rented space for his business, and absent exigent circumstances, a warrantless seizure and subsequent search of the bales became unreasonable under any theory.

Clearly, they were no longer in transit or under the dominion of Customs. Nor, as the trial court determined, is this a case where the search was incident to a lawful arrest. Such a search could not extend beyond Ms. Cunningham or the area within her immediate reach, since the justification of this type of search is only to protect the arresting officers or prevent destruction of evidence. (*Chimel v. California* 395 U.S. 752.) Those concerns were not present or alleged to be present in the present case. The most probable explanation of what occurred was offered by the testimony of Agent Cook. Agent Cook neither applied for nor obtained a warrant, since he mistakenly believed that a warrant was only necessary in cases where evidence was to be seized from a residence. The law, as articulated in *Chadwick,* and relied on by the trial court, is that the Fourth Amendment Warrant Clause is not limited to protection of only dwellings and other specifically designated locales. Although respondent did not actually instruct that the bales be placed in the store, once this had been done on his behalf he was entitled to protection from unreasonable government intrusion.

Chadwick, however, is not necessary for a determination of this matter. As our Supreme Court stated in *People v. Dumas* (1973) 9 Cal.3d 871, 881-882: "The pattern of prior decisions suggests that one of the most crucial determinants of the validity of warrantless searches is the nature of the place subjected to search. This pattern has been created by the interweaving of constitutional concepts with fundamental human needs and expectations. The courts have implicitly recognized that man requires some sanctuary in which his freedom to escape the intrusions of society

is all but absolute. [Fn. omitted.] Such places have been held inviolate from warrantless search except in emergencies of overriding magnitude, such as pursuit of a fleeing felon (*Warden v. Hayden* (1967) 387 U.S. 294 . . .) or the necessity of action for the preservation of life or property (*People v. Roberts* (1956) 47 Cal.2d 374, 377 . . .; *People v. Sirhan* (1972) 7 Cal.3d 710, 735-741 . . .; cf. *Chimel v. California* (1969) *supra,* 395 U.S. 752.)[8]"

In that case, footnote 8 provides: "Homes and *offices* clearly fall within this category of maximum protection (*Vale v. Louisiana* (1970) 399 U.S. 30 . . .; *Silverman v. United States* (1961) 365 U.S. 505, 511-512 . . .) as do hotel rooms (*Stoner v. California* (1964) 376 U.S. 483 . . .; *United States v. Nelson* (6th Cir. 1972) 459 F.2d 884)." (Emphasis added.)

Once the bales of burlap were placed inside the bookstore, control by the Customs Service ended. In the absence of any emergency, any subsequent government intrusion without a warrant was unreasonable.

We, therefore, affirm the order granting the motion to suppress and dismissing the information.

CERTIFIED FOR PUBLICATION.

Miller, J.

WE CONCUR:

Taylor, P.J.

Rouse, J.

APPENDIX B

In the Court of Appeal
of the
State of California

First Appellate District

Division Two

1/Crim. No. 17661

People of the State of California,
Plaintiff and Appellant,

vs.

John Michael Whyte,
Defendant and Respondent.

[Filed Mar. 2, 1979]

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated Mar. 2, 1979

Taylor, P. J.

APPENDIX C

Order Due
April 30, 1979

ORDER DENYING HEARING
After Judgment by the Court of Appeal
1st District, Division 2, Crim. No. 17661

In the Supreme Court of the State of California
In Bank

People
v.
Whyte

[Filed Apr. 19, 1979]

Appellant's petition for hearing DENIED.

Bird
Chief Justice

APPENDIX D

California Health and Safety Code:

Section 11360. Transportation, sale, import, give away, etc.; punishment

(a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years.

Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than one avoirdupois ounce of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.

(Added by Stats.1972, c. 1407, § 3. Amended by Stats. 1973, c. 1078, § 11; Stats.1975, c. 248, § 3; Stats.1976, c. 1139, § 74.)

APPENDIX E

U.S.C. TITLE 5—APPENDIX II

REORGANIZATION PLAN NO. 2 OF 1973

Eff. July 1, 1973, 38 F.R. 15932, 87 Stat. 1091, as amended Mar. 16, 1974, Pub.L. 93—253, § 1, 88 Stat. 50.

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 28, 1973, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code [chapter 9 of this title].

LAW ENFORCEMENT IN ILLICIT DRUG ACTIVITIES

Section 1. Transfers to the Attorney General. There are hereby transferred from the Secretary of the Treasury, the Department of the Treasury, and any other officer or any agency of the Department of the Treasury, to the Attorney General all intelligence, investigative, and law enforcement functions, vested by law in the Secretary, the Department, officers, or agencies which relate to the suppression of illicit traffic in narcotics, dangerous drugs, or marihuana, except that the Secretary shall retain, and continue to perform, those functions, to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, or marihuana or to the apprehension or detention of persons in connection therewith, at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States: *Provided,* that any illicit narcotics, dangerous drugs, marihuana, or related evidence seized, and any person apprehended or detained by the Secretary or any officer of the Department of the Treasury, pursuant to the authority retained in them by virtue of this section, shall be turned over forthwith to the

jurisdiction of the Attorney General; *Provided further,* that nothing in this section shall be construed as limiting in any way any authority vested by law in the Secretary of the Treasury, the Department of the Treasury, or any other officer or any agency of that Department on the effective date of this Plan with respect to contraband other than illicit narcotics, dangerous drugs and marihuana; and *Provided further,* that nothing in this section shall be construed as limiting in any way any authority the Attorney General, the Department of Justice, or any other officer or any agency of that Department may otherwise have to make investigations or engage in law enforcement activities, including activities relating to the suppression of illicit traffic in narcotics, dangerous drugs, and marihuana, at ports of entry or along the land and water borders of the United States.

Sec. 2. [Repealed. Pub.L 93-253, § 1(a)(1), (b), Mar. 16, 1974, 88 Stat. 50, eff. July 1, 1973. Section had provided for transfer to Secretary of Treasury of functions vested in Attorney General, Department of Justice, or any other officer of such Department respecting inspection at ports of entry of persons, and documents of persons, entering or leaving the United States.]

Sec. 3. Abolition. The Bureau of Narcotics and Dangerous Drugs, including the Office of Director thereof, is hereby abolished, and section 3(a) of Reorganization Plan No. 1 of 1968 is hereby repealed. The Attorney General shall make such provision as he may deem necessary with respect to terminating those affairs of the Bureau of Narcotics and Dangerous Drugs not otherwise provided for in this Reorganization Plan.

Sec. 4. Drug Enforcement Administration. There is established in the Department of Justice an agency which shall be known as the Drug Enforcement Administration, hereinafter referred to as "the Administration."

Sec. 5. Officers of the Administration. (a) There shall be at the head of the Administration the Administrator of Drug Enforcement, hereinafter referred to as "the Administrator." The Administrator shall be appointed by the President by and with the advice and consent of the Senate, and shall receive compensation at the rate now or hereafter prescribed by law for positions of level III of the Executive Schedule Pay Rates (5 U.S.C. 5314) [section 5314 of this title]. He shall perform such functions as the Attorney General shall from time to time direct.

(b) There shall be in the Administration a Deputy Administrator of the Drug Enforcement Administration, hereinafter referred to as "the Deputy Administrator," who shall be appointed by the President by and with the advice and consent of the Senate, shall perform such functions as the Attorney General may from time to time direct, and shall receive compensation at the rate now or hereafter prescribed by law for positions of level V of the Executive Schedule Pay Rates (5 U.S.C. 5316) [section 5316 of this title].

(c) The Deputy Administrator or such other official of the Department of Justice as the Attorney General shall from time to time designate shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.

Sec. 6. Performance of transferred functions. The Attorney General may from time to time make such provisions

as he shall deem appropriate authorizing the performance of any of the functions transferred to him by the provisions of this Reorganization Plan by any officer, employee, or agency of the Department of Justice. [Section, formerly subsec. (a), so designated and former subsec. (b) providing for performance of functions transferred to Secretary of Treasury by any officer, employee, or agency of Treasury Department, repealed by Pub.L. 93-253, § 1(a)(2), (b), Mar. 16, 1974, 88 Stat. 50, eff. July 1, 1973.]

Sec. 7. Coordination. The Attorney General, acting through the Administrator and such other officials of the Department of Justice as he may designate, shall provide for the coordination of all drug law enforcement functions vested in the Attorney General so as to assure maximum cooperation between and among the Administration, the Federal Bureau of Investigation, and other units of the Department involved in the performance of these and related functions.

Sec. 8. Incidental Transfers. (a) So much of the personnel, property records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available or to be made available in connection with the functions transferred to the Attorney General and to the Secretary of the Treasury by this Reorganization Plan as the Director of the Office of Management and Budget shall determine shall be transferred to the Department of Justice and to the Department of the Treasury, respectively, at such time or times as the Director shall direct.

(b) Such further measures and dispositions as the Director of the Office of Management and Budget shall deem to be necessary in order to effectuate transfers referred to

in subsection (a) of this section shall be carried out in such manner as he shall direct and by such Federal agencies as he shall designate.

Sec. 9. Interim Officers. (a) The President may authorize any person who, immediately prior to the effective date of this Reorganization Plan, held a position in the Executive Branch of the Government to act as Administrator until the office of Administrator is for the first time filled pursuant to the provisions of this Reorganization Plan or by recess appointment as the case may be.

(b) The President may similarly authorize any such person to act as Deputy Administrator.

(c) The President may authorize any person who serves in an acting capacity under the foregoing provisions of this section to receive the compensation attached to the office in respect to which he so serves. Such compensation, if authorized, shall be in lieu of, but not in addition to, other compensation from the United States to which such person may be entitled.